UNITED NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 800

Case No. 887: MERA RODRIGUEZ Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, at the request of Ruby Mera Rodriguez, a staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 January 1996;

Whereas, on 6 November 1995, the Applicant filed an application containing pleas which, in part, request the Tribunal:

"...

(a) To rescind the decision of the Secretary-General not to accept the recommendation of the Joint Appeals Board awarding the longevity step due to the Applicant as of 1 November 1992;

(b) To find and rule that the decision of the Respondent not to award the Applicant the longevity step due to her was motivated by prejudice and procedurally flawed;

...

(f) To find and rule that the Applicant's career with UNICEF has been adversely affected by the intrusion of discriminatory and prejudicial treatment by her supervisors;

(g) To award the Applicant additional appropriate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(h) To order the Respondent to ensure that a fair and impartial assessment of the Applicant's performance be made for the period since 1988 and that all prejudicial materials from that period be removed from the Applicant's official file;

(i) To award the Applicant as costs, the sum of $6,000.00 in legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 1 April 1996;

Whereas the Applicant filed written observations on 8 May 1996;

Whereas, on 22 and 26 August 1996, the Applicant submitted further documents;

Whereas, on 21 October 1996, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, on 1 November 1996, the Applicant submitted to the Tribunal an additional document, dated 31 October 1996, advising her of the Administration's decision to abolish her post;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 14 February 1969, as a Clerk/Typist at the G-2, step III level, on a three-month fixed-term contract. On 14 May 1969, the Applicant's appointment was converted to a probationary appointment. In November 1969, the Applicant was promoted to the G-3, step I level, as a Clerk/Typist in the Division of Public Information. On 1 February 1971, she was granted a permanent appointment at the G-3 level. On 1 November 1972, she was promoted to the G-4 level, as a Photo Librarian/ Secretary. On 1 January 1981, the Applicant was promoted to the G-5 level, as a Photo Assistant. With retroactive effect to January

1985, following the realignment exercise for all general service posts in accordance with CF/AI/1985-04 of 1 March 1985, the level of the Applicant's post was changed to G-6 on 28 August 1985 and she became a Photo Exhibit Assistant. With effect from 26 August 1988, the Applicant was transferred to the Photo Design and Distribution Unit (PDDU), as a Photo Assistant, at the same level. At the beginning of 1992, the PDDU merged with the Research and Editorial Section to form the Editorial, Publications and Photo Section, where the Applicant serves at the G-6, step X level, as a Photo Assistant.

The Applicant's performance evaluation reports (PERs) from 1970 to 1987 gave her evaluations varying from "very good" to "good". The PER covering the period from 15 June 1983 to 28 February 1984 evaluated the Applicant's performance as "good". Her supervisor noted (under Section III, column 6) that "the staff member works best when fully responsible for an assignment, which sometimes is problematic when input from several people is required". The Applicant's supervisor also stated (under Section III, column 7) that there was "some friction" in the Applicant's work relationships, "due to overlapping assignments". The PER covering the period from 1 March 1984 to 28 February 1985 evaluated the Applicant as "good". Her supervisor repeated comments similar to those made in the previous PER. The PER covering the period from 1 March 1985 to 28 February 1986 evaluated the Applicant as "good" to "very good".

On 30 October 1987, the Director, Division of Information and Public Affairs wrote to the Recruitment and Placement Officer with reference to the Applicant's candidacy for the post of Photo Assistant, stating, inter alia:

> "I wish to make clear the Division's view - which is that [the Applicant] does not meet the professional and technical standards now obtaining in the unit and would not be able, on

all the evidence of past performance, to maintain the photo operation at its current level of performance."

The Applicant replied to this memorandum on 11 November 1987, noting that the author of the 30 October memorandum had never been her direct supervisor, that the contents of that memorandum were inconsistent with her previous PERs, and that she could not be held responsible for upper level management decisions that had affected UNICEF's photo operation.

At its meeting of 12 April 1988, the New York General Service Appointment and Promotion Committee unanimously recommended the Applicant's appointment to the post of Photo Assistant (Post 00531). The Applicant assumed the duties of this post on 28 August 1988. On 22 September 1988, the Applicant wrote to her supervisor, noting that some of her responsibilities were being discharged by another staff member. She requested that she be allowed to perform these responsibilities, as provided in her job description.

Neither the Applicant nor the Respondent completed their respective portions of the PER for the period 1988-90. On 25 September 1990, the Applicant wrote to the Director, Division of Personnel (DOP). She objected to the fact that, contrary to the rules and regulations on completion of PERs, her supervisor had given her the PER for completion on his last day of service with UNICEF. The Applicant's PER covering the period from 29 November 1990 to 14 October 1991 evaluated her professional competence as "2" ("passable"); productivity as "3" ("good"); quality of work as "2" ("passable"); work relationships as "2" ("passable"); and communication skills as "3" ("good"). The Applicant submitted a detailed statement rebutting the PER, but did not sign Part 6 ("Final Review and Signature by Staff Member") of the PER.

On 26 June 1991, the Chief, PDDU, Division of Information (DOI), noted, for the record, three instances in which he believed that the Applicant had either exceeded her official job description

or had been uncooperative and intentionally obstructionist in her conduct. On 3 July 1991, the Chief, PDDU, DOI, made a similar note. The same day, the Applicant wrote a Note for the Record rebutting the three instances cited by the Chief in his Note for the Record. On 11 October 1991, the Director, DOI, wrote to the Director, DOP, in response to the 3 July 1991 note of the Applicant that was addressed to the Director, DOP, as to the hiring of the consultants, stating, inter alia:

> "The Photo Consultant also helped the Chief of Unit co-ordinate a number of photo missions that began when [the Applicant] was on extended annual leave from 26 November 1990 until 28 February 1991 ... The Consultant did help out, but not to the exclusion of [the Applicant]. Thus, the claim by [the Applicant] that her duties have been turned over to an outside Consultant is unsubstantiated."

On 19 August 1991, the Applicant wrote to the Division of Personnel and formally applied for the post of Photo Editor/ Photographer, Post P-3, Pat. No. 92019. She noted in the letter that this post described and incorporated the duties of her current post. On 19 March 1992, the Applicant received confirmation that another staff member had been selected for the P-3 post of Photo Editor/Photographer for which she had applied.

The Applicant did not sign her PER covering the period from November 1991 to December 1992; she noted on that PER, however, that she was not given the assignments described by her supervisor. The other portions of her PER are incomplete; the Applicant asserts that her comments were missing when this PER was put in her file.

On 15 April 1993, the Officer-in-Charge, Personnel Services Section (PSS), wrote to the Director, DOI, stating:

> "[The Applicant] completed 20 years of service with UNICEF on 14 February 1989 and five years at the ceiling of her present level (G-6/10) on 31 October 1992. She therefore became eligible to receive an extra step for longevity of service, as of 1 November 1992.

> If you are in agreement with the granting of an extra step, effective 1 November 1992, for [the Applicant], please let us have your recommendation together with original PERs covering the period 1 March 1986 to date, to support your recommendation."

On 1 July 1993, the Director, DOI, wrote to the Officer-in-Charge, PSS, stating:

> "... It was hoped that the 1992 PER of the staff member would have been completed by now in order to support a recommendation. Despite several reminders by the supervisor, [the Applicant] has not completed her part of the 1992 PER. We are, therefore, unable to recommend that [the Applicant] be awarded an extra step for length of service."

On 27 August 1993, the Applicant submitted a request for administrative review of this decision.

On 15 November 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 25 May 1995. Its conclusions and recommendations read, in part, as follows:

> "69. In reviewing the part of the appeal concerning the granting of the longevity step, the Panel observed that two criteria were applicable in that respect, as per information circular CF/IC/1986-57.
>
> 70. In accordance with the first criterion, the staff member should have had at least twenty years of service within the United Nations Common System and five years of service at the top step of the current grade. The Panel observed that, in a communication dated 15 April 1993, [the Officer-in-Charge], Personnel Services Section, stated that the Appellant met the requirements of that criterion.
>
> 71. The second criterion requires that the staff member's service be satisfactory. In that respect, the Panel observed that Appellant was denied the granting of the longevity step because 'the latest PER was not completed due to the Appellant's refusal to do so'. The Panel further observed that the incomplete PERs - even unsigned - in Appellants's file contained enough information to permit an assessment of her performance. Basing its assessments on the series of the

PERs in file, and taking the circumstances of the case into account, the Panel considered that the Appellant met the requirement of the second criterion.

Findings and Recommendations

72. The Panel unanimously found:

(a) that the Secretary-General had approved the delegation of authority to the Executive Director, UNICEF, for the review of administrative decisions requested by UNICEF staff members under staff rule 111.2(a); and

(b) the Appellant met the requirements of the criteria laid down for the granting of the longevity step in information circular CF/IC/1986-57.

73. The Panel unanimously recommends to the Secretary-General:

(a) To reject the part of the appeal contesting the delegation of authority to the UNICEF Executive Director;

(b) To approve the granting of the longevity step as of 1 November 1992.

74. The Panel unanimously decides to make no further recommendation in support of the appeal."

On 10 July 1995, the Applicant was advised by the Under-Secretary-General for Administration and Management of the Secretary-General's decision on the JAB's recommendation:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's findings and of its unanimous recommendation related to your performance evaluation reports (PER) and longevity step. As a matter of law and policy the Secretary-General cannot agree with the findings and conclusions reached by the Board whereby incomplete PERs would be used in the granting of longevity steps.

Beside 20 years of service and 5 years at the top step of the current grade, the basic criterion for the award of a longevity step is satisfactory service by the staff member. The main tool used at UNICEF for the purpose of evaluating staff services is the PER. Once properly completed, it

reflects the evaluation of a staff member's past services and constitutes a major guide and reference for the Administration's determination of promotions, contract renewals and some other entitlements.

As a matter of equality of treatment for all staff, an evaluation system such as the PER is efficient only when everyone complies with its procedures and goals. In terms of accountability, and to avoid any favouritism or arbitrariness, management has the duty to ensure that no decision, such as [the granting of the] longevity step, be taken without the proper assessment of a staff member's performance covering recent years.

The Secretary-General cannot accept that staff be rewarded regardless of their attitude or level of performance. In the present case, the Board has devoted only cursory attention to the question whether your performance was satisfactory within the meaning of the applicable UNICEF Information Circular. These two sentences do not address nor review documentary evidence on file showing indications of uncooperative work relations, refusal to observe long-standing administrative procedures and barely acceptable performance during some past years. Added to this is your refusal to complete and/or sign the PERs. When a staff member is convinced of the existence of major irregularities in the conduct of a PER, recourses are available to redress such situations if they really exist. The Secretary-General therefore rejects the Board's argument that '... incomplete PERs -even unsigned- in Appellant's file contained enough information to permit an assessment of [your] performance'. Failing valid, complete and signed PERs, the Secretary-General is therefore unable to endorse any award for a longevity step in your favour."

On 6 November 1995, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision to deny the Applicant her longevity step is arbitrary and is tantamount to a disciplinary measure.

2. . The Applicant's rights to a fair and impartial assessment of her performance have been violated.

3. The Applicant was denied fair consideration for promotion.

4. The Applicant is being penalized for being a career staff member at a time when the Respondent appears determined to hire outside consultants.

Whereas the Respondent's principal contentions are:

1. The Respondent's refusal to grant a longevity step was a valid exercise of administrative discretion and was not motivated by prejudice or other extraneous factors.

2. The Applicant's appeal against a decision not to introduce a special performance procedure is time-barred.

3. The Applicant's challenge to UNICEF's performance appraisal system is without merit.

The Tribunal, having deliberated from 29 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant appeals a decision of the Respondent dated 10 July 1995, rejecting a unanimous Joint Appeals Board (JAB) recommendation that the Applicant should be granted a longevity step since she fulfilled the necessary criteria. The Applicant claims that the decision of the Respondent not to award her the longevity step was motivated by prejudice and was procedurally flawed. The Applicant also asserts that the procedures established by UNICEF for performance evaluation fail to afford due process and that her career with UNICEF has been adversely affected by the intrusion of discriminatory and prejudicial treatment by her supervisors. Accordingly, the Applicant asks that the Tribunal rescind the decision of the Secretary-General not to accept the JAB's recommendation awarding her the longevity step, that she be

compensated for moral damages, that she be given an impartial assessment of her performance since 1988, and that her legal fees and expenses be awarded as costs.

II. The Tribunal has reviewed the Applicant's request for an oral hearing and for the production of various documents. In view of the substantial amount of documentation in the file, the Tribunal considers that there is sufficient evidence to decide the case and rejects these requests.

III. The main issue before the Tribunal is whether the denial of the longevity step to the Applicant is a valid exercise of the Secretary-General's discretion. The Tribunal's role is to ensure that the discretionary authority of the Secretary-General is not exercised in a manner that violates notions of justice or fairness.

IV. The criteria for eligibility for a longevity step are found in paragraph 3 of UNICEF information circular CF/IC/1986-57 of 23 May 1986:

> "[The longevity step] would be granted under the following criteria defined by the [ICSC]:
>
> (a) The staff member should have had at least twenty years of service within the United Nations Common System and five years of service at the top step of the current grade.
>
> (b) The staff member's service should have been satisfactory."

The fact that the Applicant has met the first criterion is not in dispute.

The second criterion requires that the staff member's service be satisfactory. The Respondent argues, in a letter dated 1 July 1993, that the Applicant was denied the longevity step because,

despite several reminders by the supervisor, she refused to complete or sign the performance evaluation report for 1992.

V. In the Tribunal's view, it is clear that the only justification invoked by the Administration at the time was the non-completion of the Applicant's 1992 performance evaluation report (PER). Such justification can be interpreted in two different ways. Firstly, it could be interpreted as rendering the whole performance of the Applicant unsatisfactory. The Tribunal cannot accept this interpretation.

In the Tribunal's view, the satisfactory performance required eligibility for the longevity step should result from an assessment of the Applicant's performance over a reasonable number of years. A staff member's performance cannot suddenly be considered unsatisfactory on account of a single episode that would nullify previous PERs showing that the Applicant's performance was satisfactory over a number of years.

Secondly, the 1 July 1993 decision could also be interpreted to mean that, inasmuch as the 1992 PER had not been signed by the Applicant, the Administration was unable to determine whether the requirement of satisfactory performance had been met. This interpretation seems to have been the one adopted by the Secretary-General when rejecting the JAB's recommendation. In the Tribunal's view, the refusal by the Applicant to sign her 1992 PER does not constitute an impediment for the Administration to determine whether the satisfactory service requirement had been met.

VI. The Tribunal recalls once more that the satisfactory service requirement for a longevity step is not limited to the most recent period of service. The Tribunal notes that the Applicant's performance was satisfactory from 1983 to February 1987 and that, as a consequence of the reporting officer's negligence, there is no PER for the period 1987-1990. The PER covering the period 29 November

1990 to 14 October 1991 contains ratings of "barely satisfactory". It is only in the PER covering the period November 1991 to December 1992 that unsatisfactory ratings appear. It is therefore clear that, in spite of the fact that the Applicant did not complete her last two PERs, the Administration had a sufficient basis for the assessment of her performance.

The Tribunal therefore finds that the Applicant's refusal to sign her 1992 PER does not constitute a valid reason to refuse her the longevity step. As this was the reason put forward by the Administration for its refusal to grant the longevity step, the Tribunal concludes that such refusal was unfounded.

The refusal to grant this step to the Applicant verges on a disciplinary measure imposed on the Applicant for having contested her PERs. This lacks a basic notion of fairness on the part of the Respondent. The Tribunal agrees with the JAB that, taken as a whole, the Applicant's record indicated that she met the second criterion for the award of the longevity step.

VII. The Applicant contends that the procedures established by UNICEF for performance evaluation fail to accord due process. The Tribunal will not enter into considerations of the performance evaluation system. The Respondent stated correctly that UNICEF's performance appraisal system is established by a legislative text, which was promulgated after consultation with the staff. By choosing to stay at UNICEF once this procedure was promulgated, it became part of the Applicant's conditions of service and she is bound by its terms whether she personally agrees with them or not.

VIII. The Applicant also alleges that her supervisors subjected her to prejudicial and discriminatory treatment. In support of her allegation, the Applicant asserts, inter alia, the following:

(a) Persistent and continued irregularities surrounding her work assignments;

(b) The use of consultant's services to perform the core functions of her post;

(c) Violations of procedure in the preparation of her PERs; and

(d) Derogatory statements aimed at discrediting her performance.

IX. Although the Tribunal is sensitive to the Applicant's claim that there was tension between herself and her supervisor, the Tribunal finds that there is insufficient evidence to conclude that the above-mentioned actions were motivated by prejudice or discrimination. The Tribunal has consistently held that an applicant, when alleging discrimination or prejudice, has the burden of proving such allegations. (Cf. Judgements No. 312, Roberts (1983) and No. 470, Kumar (1989)). It appears to the Tribunal that the Applicant has failed to meet this burden of proof. The Tribunal must dismiss these pleas.

X. Regarding the Applicant's plea that her performance should be assessed by an impartial third party, the Tribunal agrees with the Respondent that this issue is time-barred.

XI. For the foregoing reasons, the Tribunal concludes as follows:

1. The Applicant has met the criteria in information circular CF/IC/1986-57 regarding entitlement to the longevity step. The Tribunal therefore orders the Respondent to grant this step retroactively, with effect from the date on which the Applicant's entitlement arose.

2. All other pleas concerning the abolition of the Applicant's post and her possible termination have not been considered by the JAB and are therefore not properly before the Tribunal.

3. The Tribunal rejects the remainder of the Applicant's pleas, including her request for costs.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary